IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY SUPPORTING ITS OBJECTION TO ORDER GRANTING MOTION TO COMPEL DISCOVERY OF PETERSON FARMS [DKT#1463] AND ORDER DENYING RECONSIDERATION THEREOF [DKT# 1629]

COMES NOW, the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State") and, submits its Reply in support of its Objection [DKT # 1659] pursuant to Fed. R. Civ. P. 72(a) which respectfully objects to the Magistrate Judge's Order [DKT # 1463] granting the motion to compel of Peterson Farms and to the Order [DKT # 1629] denying reconsideration.

I. Introduction

The State's Objection arises from the unprecedented application of state privilege law in a federal question case having pendant state claims. In its orders that gave rise to this Objection, the Court made no reference to the policies of federal privilege law and did not weigh the policies of federal law against those of state law as required by Tenth Circuit precedent. The resulting (erroneous) application of state privilege law resulted in a requirement that a privilege log be developed that risks revealing privileged material in order to establish the existence of the state privilege. Additionally, the Court erred in ruling that the attorney-client privilege ends with

the case for which privileged documents are generated, requiring physical production of privileged documents once the case ends.

Finally, the Court erroneously held Peterson had met its burden of showing justification to invade the State's fact work product. Peterson presented no evidence whatsoever to justify access to the State's fact work product. Even worse, both the Court and Peterson completely ignored the requirement to protect opinion work product even in instances in which release of fact work product is justified.

II. Argument

A. Peterson mischaracterizes the State's position that both state and federal privilege law policy must be considered in this case.

Peterson attributes to the State an argument directly contrary to the State's true position. Peterson claims that the State argues that "because this case is a federal question case with pendent state law claims it was completely inappropriate for Magistrate Judge Joyner to even consider much less apply Oklahoma law . . . ." Response at p. 4. However, the State has clearly stated that the Court erred in not analyzing both state and federal privilege law as required by the Tenth Circuit. If a conflict between State and Federal privilege law exists, then an analytical solution must be worked out to accommodate the conflicting policies embodied in the state and federal privilege law. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1368-69 (10th Cir. 1997). The error committed by the Magistrate Judge was failing to consider the importance and policies of federal privilege law, and by departing from the uniform authority requiring application of the federal law of privilege in federal question cases with pendant state claims.

Peterson notes that the Court began its analysis by "reasoning that the State should be governed by its own public policy, which requires disclosure to the public with very limited

exception." Response at p. 7.[1] Unfortunately, the Court both began and ended its analysis with this erroneous proposition, never correctly weighing, as have all other courts, the policy of federal privilege law and, as required by *Sprague*, working out an analytical solution to accommodate conflicting policies in state and federal privilege law. Instead, as recognized by Peterson, the Court relied on the policies contained within the Open Records Act as a "catalyst" for the state law of privilege. Indeed, the Court made no reference whatsoever to the policy of federal privilege law, nor does Peterson. By wrongly ignoring the policy of federal privilege law, the Court easily, and incorrectly, decided state law should apply.

As to choice of law issue, Peterson's Response underscores the error of Magistrate Judge Joyner's Order. Peterson still has not managed to marshal even a single case holding that in a federal question case involving pendant state law claims that state privilege law rather than the federal common law of privilege law applies. Simply put, the "analytical solution" employed by Magistrate Judge Joyner, lacking any legal support, clearly departs from the "light of reason and experience" which is the foundation of Fed. R. Evid. 501.

B. The Court's unprecedented application of State privilege law is compounded by the unprecedented requirements of a revised privilege log.

The State's privilege logs were designed to comply with the requirements of Federal Rule of Civil Procedure 26(b)(5)(A) and this Court's Local Civil Rule 26.4. However, because the Court erred in applying state privilege law with its heightened requirements, it imposed heightened requirements for a privilege log not found in either the Federal Rules or the Local Rule. This was error as well. As to the privilege log issue, Peterson has not cited a single case

[1] Peterson again misstates the State's position by claiming that public policy is irrelevant to the Court's analysis under *Sprague.* Response at p. 7. To the contrary, the State believes that when both state and federal policy are considered, as they must be, the correct result is to apply federal privilege law.

supporting the requirement in Magistrate Judge Joyner's Order that the State must generate a privilege log that, as a practical matter and contrary to Fed. R. Civ. P. 26(b)(5)(A), would reveal information that itself is protected or privileged for opposing counsel's inspection. In the event that it were (erroneously) determined that state privilege law applies and that such a log must therefore be created, Magistrate Judge Joyner's refusal to review such a log *in camera* is thus clearly erroneous and contrary to law because, in the end, only an *in camera* review of the contested documents could resolve their status in any event, and review by the Court of both the logs and the documents *in camera* would speed that process and protect the State's privilege claims.

C. No production should be required for privileged documents generated in now completed cases.

Neither the Court nor Peterson cites any case upholding the Court's order for production of attorney-client privileged documents generated in cases which have now been completed, even if State privilege law applies. As demonstrated by the State, once the privilege attaches, it remains. Respectfully, the Court erred in ordering the production of privileged documents once the case from which they arose is completed.

D. Neither the Court nor Peterson properly establishes need for the State's work product.

If, contrary to the overwhelming weight of authority, the Court maintains the application of state privilege law, no production should be required which does not also take account of the State's work product claims. Peterson claims it challenged 253 documents for which attorney-client privilege was claimed, and only 99 documents for which work product was claimed. Response at p. 2. However, the State claimed both attorney-client privilege and work product protection for many of these documents, far more than 99, and neither the Court nor Peterson

make any provision for dealing with both the privilege and the work product protection. Production should not be required until the Court properly denies both the attorney-client privilege and the work product protection. The required exercise of production for documents for which no "claims" are still pending (putting aside the fact the Court did not require production of documents dealing with "investigations" or "actions") without properly analyzing, on a document by document basis, the State's work product claim and Peterson's claim to pierce it, is an impermissible short cut.

As to the work product issue, Peterson's Response underscores the error of Magistrate Judge Joyner's Order. Peterson cites to no evidence either considered or relied upon Magistrate Judge Joyner supporting the proposition that it has a "substantial need" for the State's fact work product for the very simple reason that none exists. Indeed, Peterson makes no reference to the record whatsoever. All that was presented was argument. Argument is not evidence, and for Magistrate Judge Joyner to conclude that there was "substantial need" such fact work product on the basis of such argument is clearly erroneous and contrary to law. Additionally, Peterson has cited to no authority supporting Magistrate Judge Joyner's conclusion that the State's opinion work product is discoverable. Simply put, Peterson's Response utterly fails to substantiate the legal and factual propriety of Magistrate Judge Joyner's Order -- for the very simple reason that no legal authority or evidence exists. Magistrate Judge Joyner's Order is wrong and should be reversed.

Part of Peterson's *argument* that it needs the State's work product is that the State is a potentially responsible party in the case, without any hint about why that would be true beyond the claim that the contested work-product documents "specifically deal with the State's administrative obligations.". Response at p. 12-13. Thus, apparently Peterson claims, not that

the State polluted the IRW, but that it improperly discharged its "administrative responsibilities." Painting with a broad brush, Peterson claims entitlement to the State's work product with regard to its actions pertaining to Sequoyah Fuels, "Jock Worley's unlawful mining activities," water quality violations by the City of Watts, a proposed sewage project in West Siloam Springs, Lake Francis' contribution to water quality, and an illegal dam on the Barron Fork. Response at p. 12. Yet nowhere has Peterson explained how it has a specific "substantial need" for any of the State's work product on these topics, or how it cannot without undue hardship acquire the substantial equivalent of the information contained therein.

E. Both the Court and Peterson entirely ignore the requirement to protect opinion work product.

Most flagrantly, Peterson completely ignores the requirement to protect the State's opinion work product. By its terms, Rule 26(b)(3) requires, even when the required showing of substantial need and no substantial equivalent without undue hardship has been made, that the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. This Court has recognized, opinion work product is afforded greater protection than fact work product, and, while the Supreme Court and the Tenth Circuit have not decided if such opinion work product is absolutely protected, at least some circuits have found it to be entitled to absolute protection. *See Cardtoons v. Major League Baseball*, 199 F.R.D. 667, 684-85 (N.D. Okla. 2001).

Neither the Court nor Peterson even *mentions* the requirements of Rule 26(b)(3) or this Court's prior opinion in *Cardtoons*, or otherwise addresses the requirement to protect opinion work product. For this failing alone reversal is appropriate.

III. Conclusion

For all the foregoing reasons, the State of Oklahoma respectfully asks the Court to sustain its Objection to the Magistrate Judge's Order [DKT # 1463] granting the motion to compel of Peterson Farms and to the Order [DKT # 1629] denying reconsideration.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

s/Robert A. Nance
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
David P. Page OBA #6852
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blackmore OBA #18656
BULLOCK BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119-1031
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice)*
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
(admitted *pro hac vice)*
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	Fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina Lynn Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs driggs@riggsabney.com
Joseph P. Lennart jlennart@riggsabney.com
Richard T. Garren rgarren@riggsabney.com
Douglas A. Wilson doug_wilson@riggsabney.com
Sharon K. Weaver sweaver@riggsabney.com
David Page dpage@riggsabney.com
Robert A. Nance rnance@riggsabney.com
D. Sharon Gentry sgentry@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Louis W. Bullock lbullock@bullock-blakemore.com
Robert M. Blakemore rblakemore@bullock-blakemore.com
BULLOCK BULLOCK & BLAKEMORE

Frederick C. Baker fbaker@motleyrice.com
Lee M. Heath lheath@motleyrice.com
Elizabeth C. Ward lward@motleyrice.com
Elizabeth Claire Xidis cxidis@motleyrice.com
William H. Narwold bnarwold@motleyrice.com
Ingrid L. Moll imoll@motleyrice.com
Jonathan D. Orent jorent@motleyrice.com
Michael G. Rousseau mrousseau@motleyrice.com
Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC
Counsel for State of Oklahoma

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C. Senger dsenger@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

Robert E Sanders rsanders@youngwilliams.com
Edwin Stephen Williams steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker jtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
Colin Hampton Tucker ctucker@rhodesokla.com
Leslie Jane Southerland ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com

THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Dara D. Mann dmann@faegre.com
Krisann C. Kleibacker Lee kklee@faegre.com
Todd P. Walker twalker@faegre.com
FAEGRE & BENSON, LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Paul E. Thompson, Jr pthompson@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
Jennifer E. Lloyd jlloyd@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.
Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip Hixon phixon@mhla-law.com
Craig A. Merkes cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
Counsel for Peterson Farms, Inc.

John Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

Stephen L. Jantzen sjantzen@ryanwhaley.com
Paula M. Buchwald pbuchwald@ryanwhaley.com

Patrick M. Ryan pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

Mark D. Hopson mhopson@sidley.com
Jay Thomas Jorgensen jjorgensen@sidley.com
Timothy K. Webster twebster@sidley.com
Thomas C. Green tcgreen@sidley.com
Gordon D. Todd gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP

Robert W. George robert.george@kutakrock.com
Michael R. Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
KUTAK ROCK, LLP
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Jennifer Stockton Griffin jgriffin@lathropgage.com
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

Robin S Conrad rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER

Gary S Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
Hall, Estill, Hardwick, Gable, Golden & Nelson
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com

Crowe & Dunlevy
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General — Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General — Charles.Moulton@arkansasag.gov
Jessica E. Rainey — jrainey@titushillis.com
Barry G. Reynolds — reynolds@titushillis.com
TITUS HILLIS REYNOLD LOVE
DICKMAN & McCALMON

William S. Cox, III — wcox@lightfootlaw.com
Nikaa Baugh Jordan — njordan@lightfootlaw.com
LIGHTFOOT, FRANLIN & WHITE
Counsel for American Farm Bureau Federation and the National Cattlemen's Beef Association

John D. Russell — jrussell@fellerssnider.com
FELLERS, SNIDERS, BLAKENSHIP,
BAILEY & TIPPENS, P.C.

William A. Waddell, Jr. — waddell@fec.net
David E. Choate — dehoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP
Counsel for Amicus Curiae Arkansas Farm Bureau Federation

Mia Vahlberg — mvahlberg@gablelaw.com
GABLE GOTWALS

Adam J. Siegel — ajsiegel@hhlaw.com
James T. Banks — jtbanks@hhlaw.com
HOGAN & HARTSON, LLP
Counsel for National Chicken Counsel, U.S. Poultry & Egg Association and National Turkey Federation (collectively "Amici Curiae")

M. Richard Mullins — richard.mullins@mcafeetaft.com
MCAFEE & TAFT
Counsel for Texas Farm Bureau, Texas Cattle Feeders Association Texas Pork Producers Association and Texas Association of Dairymen

Also on this 28th day of April, 2008, I mailed a copy of the above and foregoing pleading to the following:

David Gregory Brown
Lathrop & Gage, LC
314 E. High Street
Jefferson City, MO 65101

Thomas C. Green
Sidley Austin Brown & Wood, LLP
1501 K St. NW
Washington, DC 20005

Cary Silverman
Victor E. Schwartz
Shook Hardy & Bacon LLP
600 14th St. NW, Ste. 800
Washington, DC 20005-2004

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Gary V. Weeks
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center Street, Suite 200
Little Rock, AR 72201-2610

s/Robert A. Nance
Robert A. Nance